IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. ~~295~~ 1024

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 937.

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO AFFIRM.

Appellee, New York, Susquehanna and Western Railroad Company (hereafter called "Susquehanna"), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

Statement.

In 1953 Susquehanna emerged from a bankruptcy reorganization of 16 years' duration, with capitalization reduced from $42 million to $16 million, and fixed interest debt reduced from $12 million to $5 million; in approving the plan of reorganization, the I. C. C. estimated that earnings available for interest and other corporate purposes would approximate $700,000 annually. These earnings were never realized. Its major freight customer, the Ford Motor Company, vacated the Edgewater plant served by Susquehanna and relocated on a highway in Mahwah, N. J. Freight earnings, which had been $1,148,764 in 1950 declined to a deficit of $185,045 in 1959. Susquehanna sustained an unbroken line of out-of-pocket losses from passenger operations in every year since emerging from reorganization, and since the end of 1957, freight operations have also been at a deficit.*

In April, 1956, Susquehanna instituted proceedings before appellant Board; extended hearings were not concluded until April, 1957. At that time the New Jersey legislature passed Senate Concurrent Resolution No. 20 (1957) purporting to declare as public policy that abandonment or curtailment of rail passenger service be denied pending receipt of the report of a bi-state Rapid Transit Commission, and the Board ordered further proceedings suspended. The New Jersey Supreme Court held the Concurrent Resolution to be ineffective. *(In re N. Y., Susquehanna and Western R. R. Co.*, 25 N. J. 343, 136 A. 2d 408, decided November 25, 1957), and in December the Board

* All parties certainly know, from the record and from reports filed with them, that from January 1, 1958 to December 31, 1961, passenger out-of-pocket losses totalled over $900,000, and freight deficits total over $460,000, with combined losses exceeding $1,380,000 (an average of $345,000 per year, with railway operating revenues for 1961 declined to $3.6 million, while other income is less than $50,000).

entered an order permitting some but not all of the curtailment sought. Susquehanna appealed, and after some seventeen months secured further relief from the Appellate Division of Superior Court (*Susquehanna, etc. Ass'n v. P. U. C.*, 55 N. J. Super. 377, 151 A. 2d 9, decided May 1, 1959). An unnecessary loss of nearly half a million dollars, caused by the forced continuance of trains ultimately found not to be required, was suffered as a result of this delay.

By the end of 1960, Susquehanna's passenger train service consisted of three commuter trains eastbound in the morning, and three westbound in the evening. Each train consisted of a diesel engine and one passenger car. For the year 1960, this operation involved an "above-the-rail" cost of some $117,000 (crew wages alone being over $100,000), while total passenger revenue was only $65,000.)*

As shown by its suburban time table, these trains carry passengers between various New Jersey points (Butler, N. J. being the most westerly, 37.9 miles from New York) and the Port Authority Bus Terminal at 41st St., New York City. Physically, the eastbound passengers leave the trains at Susquehanna Transfer (a transfer point and not a station, no tickets being sold to or from that point) and from there are transferred to the 41st St. Bus Terminal on special contract buses, operated exclusively for Susquehanna's passengers. The westbound routine is the same: train passengers only may board the transfer bus at the Bus Terminal and are taken to Susquehanna Transfer where they board the train. The buses connect with the trains in both directions. Susquehanna passengers at Susquehanna Transfer have no option to go anywhere except on the transfer bus eastbound and on the connecting train westbound; there are no other authorized entrances or exits to or from Susquehanna Transfer.

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* For 1961, the passenger out-of-pocket loss was $147,292, while crew wages rose to over $110,000 and passenger revenue declined to $59,000.

As is clear from the footnote to the majority opinion below, Susquehanna carries nearly all its passengers to and from New York City.*

On December 29 and 30, 1960, Susquehanna posted, and on December 30, 1960, served and filed notices complying with section 13a(1) of the Interstate Commerce Act (hereafter designated the "Act"), announcing that the trains mentioned would be discontinued at 12:01 A. M., January 30, 1961. It also filed with the I. C. C. a detailed Statement, as required by its rules, setting out all pertinent facts, including those set out above.

On January 9, 1960, appellants State and Board filed a Petition to Dismiss for asserted lack of jurisdiction, and on January 18, 1960, without awaiting the expiration of the 20 day period allowed by I. C. C. rules for the filing of a Reply by Susquehanna, the I. C. C. entered an order of dismissal. Susquehanna nonetheless filed its Reply within the proper time, and thereafter an Amended Reply as well as a Petition for Reconsideration, which the State and Board opposed. Upon denial of that Petition, the suit below was promptly initiated.

At the trial below, appellees the United States and the I. C. C. explicitly recognized that Susquehanna's passenger service between New Jersey and New York constitutes "interstate rail transportation"; appellants State and Board were silent on the point in their brief, and when questioned conceded that their position in that regard was the same as that of the United States and the I. C. C.

The decision of the District Court was based on the obviously interstate nature of the passenger service involved,

* The table there given works out to an average daily total of 245.8 passengers (who make 2 trips each day, one eastbound and one westbound), of which only 28 travel intrastate. The most heavily patronized eastbound train, No. 910, with 126.4 average daily passengers carries only 6.3 passengers intrastate; and the most heavily patronized westbound train, No. 923, with 120.1 average daily passengers, carries only 1.5 passengers intrastate.

especially in light of earlier determinations by the I. C. C., to which appellants State and Board were parties, holding that when Susquehanna's trains are at Susquehanna Transfer, they are within the carrier's terminal area at New York; that the transfer of passengers between that point and the 41st Street Bus Terminal, by special contract bus, is an intraterminal transfer, is required by the Act to be considered as performed by Susquehanna, and is to be regarded and regulated as rail transportation. This statutory scheme, expressed in section 202(c) of the Act (49 U. S. C. A. section 302(c)), was in effect and doubtless known to Congress when it enacted the 1958 Transportation Act which included the provisions now referred to as section 13a of the Act. The majority found that both factually and as a matter of law, the specific train-bus arrangement in this case was a single, integrated service, the transfer within the terminal area being incidental to and part of the rail service. The majority opinion also rested on the entire history which led to the enactment of section 13a, and held that it was to be read as remedial legislation, and not with unreasonable narrowness and strictness.

The dissenting opinion adopted the position taken by appellants State and Board, looking at the single word, "train", and giving no effect to the whole phrase: "the discontinuance or change * * * of the operation or service of any train * * *."

The defendants United States and the Interstate Commerce Commission were parties below. They did not appeal from the judgment and obviously are appellees, though not so noted on the Statement of appellants State and Board.

Susquehanna filed a cross-appeal from that part of the judgment which compelled it to continue operating the trains pending this appeal, without requiring bond or other indemnity against loss or other appropriate terms and conditions. The time for docketing the cross-appeal has been extended pending disposition of this motion,

since its prosecution will be unnecessary unless probable jurisdiction is noted.

ARGUMENT.

The question advanced by appellants State and Board is not substantial, and the decision of the District Court is fully consistent with related decisions and applicable law.

Prior to the enactment of the Transportation Act of 1958, the line of demarcation between Federal and State authority was that (a) if a carrier by rail wished to discontinue all operations on a line of railroad or on part of such line (i. e., an abandonment), sole authority to pass on the proposal was vested in the I. C. C., under sec. 1(18) of the Act, and this exclusive jurisdiction existed without regard to whether the line or portion of a line was interstate or intrastate; and (b) if a carrier by rail wished to discontinue or change the operation or service of one or more trains, but proposed to continue other operations (i. e., a curtailment of service), sole authority to pass on the proposal was vested in the state regulatory agencies, and where the service to be affected was interstate, approval had to be obtained from the regulatory agency of every state involved. This pattern is clearly described in *Board of Public Utility Commissioners* v. *United States*, 158 F. Supp. 98 (D. N. J. 1957).

Under the law as it then stood, Susquehanna would have had to secure permission from the regulatory agencies of both New Jersey and New York in order to discontinue the rail passenger service between Butler, N. J., and New York which is here involved.

This pattern of jurisdiction was altered by the enactment of section 13a of the Act by the Transportation Act of 1958. The reasons for its enactment are succinctly expressed in the legislative history of the House bill: "Be-

cause of this delay in authorizing, or absolute refusal to authorize, discontinuance of little-used services, it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than the State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State. This limitation is contained in the bill being reported because the committee feels that the record at this time does not support the broader change in venue, requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State." *House Report No. 1922, 85th Congress, Second Session, 1958 U. S. Code Congressional and Administrative News*, pp. 3456, 3468.

During Senate debate on a proposed amendment which culminated in the division of section 13a into paragraphs (1) and (2), it was made thoroughly clear that the word "train" carried with it all of the accoutrements, all of the "facilities"—and specifically the "terminals"—of a train. The discussion makes it explicit that only when both the train and its facilities (i. e., terminals) are wholly intrastate, 13a(2) applies; but that if either be interstate, 13a(1) applies.*

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* Senator Smathers made it clear that the new law would leave to State agencies "any train having its origin and destination in the same State, together with the facilities—specifically the terminals—serving that particular train." Senator Russell noted that the language referred "to the train", and Senator Smathers replied that it also applied "to the facilities which serve the train." Pressing further, Senator Russell asked: "Facilities which are wholly intrastate in character?" and the reply was, "That is correct." Then, answering questions from Senator Kuchel, Senator Smathers said, "We give authority to the Interstate Commerce Commission only over interstate commerce trains. We more clearly define that the [State] public utilities commission has authority over completely intrastate trains and facilities." *Sen. Debate, June 11, 1958, 104 Cong. Record 10852-10853.*

In earlier I. C. C. proceedings dealing with the operation here involved, and to which both Susquehanna and appellants State and Board were parties, it was decided that (a) Susquehanna has long served Manhattan from New Jersey points both in freight and passenger rail service; (b) when Susquehanna's trains arrive at North Bergen (where the Transfer is located), they have entered Susquehanna's terminal area at New York; and (c) the transfer of Susquehanna passengers between Susquehanna Transfer and the 41st St. Terminal is an intraterminal transfer coming within section 202(c) of the Act. These determinations appear in *New York S. & W. R. Co. Common Carrier Application*, 34 M. C. C. 581, at 583, 585 and 586 (1942), on rehearing 46 M. C. C. 713 at 718-19 and 723-4 (1946), as well as in *Commutation Fares, New York, S. & W. R. Co.*, 280 I. C. C. 31, at 34 (1951).

None of these determinations were ever challenged or made the subject of review proceedings, and appellants State and Board are bound thereby.

By virtue of section 202(c) of the Act, the intraterminal transfer operation must be regarded, in contemplation of law, as a train operation and it must be regulated in the same fashion.

This conclusion and result is fully consistent with the treatment of the terminal problem in the Port of New York area, dealt with in the New York Dock case, *New York Dock Railway* v. *Pennsylvania Railroad Co.*, 62 F. 2d 1010 (C. A. 3d, 1933), cert. den. 289 U. S. 750, 53 S. Ct. 694, 77 L. ed. 1495. And see, also, *United States* v. *Elgen*, 98 F. 2d 264 (C. A. D. C. 1938), noting the long recognized terminal arrangement in the New York metropolitan area.

The interstate nature of transportation, despite the physical limitations compelling the changing of specific vehicles has also been recognized in *United States* v. *Capital Transit Co.*, 325 U. S. 357, 65 S. Ct. 1176, 89 L. ed. 1663 (1945).

Nor is this treatment unique to railroads. Interterminal and intraterminal movements by motor vehicles, in order to connect with airports, have similarly been held to be "air transportation." *City of Philadelphia* v. *Civil Aeronautics Board,* 289 F. 2d 770 (C. A. D. C. 1961).

Arlington & F. A. R. Co., 228 I. C. C. 479 (1938), relied on by appellants State and Board below but not cited in their Statement, is not to the contrary. Section 202(c) of the Act, which controls this case, was not enacted until September 18, 1940, two years later (see 54 Stat. 920, 49 U. S. C. sec. 302). In addition, in *United States* v. *Elgen, supra,* which preceded *Arlington*, the court noted the factual differences which distinguished the long standing recognition that New York City was the terminal of the railroads which came up to the west bank of the Hudson River, and that their river crossing were functionally and legally the equivalent of tracks to the New York City terminal.

The two sets of *Ferry* cases, one before and the other after the enactment of section 13a(1), fully support the decision below. The first set of cases, *Board of Public Utility Commissioners* v. *United States,* (two cases) 158 F. Supp. 98 and 104 (D. N. J. 1957), prob. juris. noted 357 U. S. 917, 78 S. Ct. 1358, 1359, 2 L. ed. 2d 1361, 1362 (1957), dismissed as moot, 359 U. S. 957 and 982, 79 S. Ct. 795 and 939, 3 L. ed. 2d 765 and 932 (1959), held that from a functional standpoint the specific means used to cross the Hudson River was not significant, and that whether there be ferries or barges or a bridge or a tunnel, and whether they went to different parts of New York City did not justify differentiation between them as there was but a single line of railroad between the two States. In the second set of cases, *State of New Jersey, et al.* v. *United States, et al.* (two cases), 168 F. Supp. 324 and 342 (D. C. N. J. 1938), *aff'd* 359 U. S. 27, 79 S. Ct. 603 and 607, 3 L. ed. 2d 625, reh. den. 359 U. S. 950, 79 S. Ct. 722, 3 L. ed. 2d 683 (1959), the court observed that since the first decision "Congress

has been heard from most emphatically and distinctly upon the subject", and ruled that under the new statute a railroad, of its own initiative and without any prior authorization, might discontinue a ferry "or any portion of its service operated in interstate commerce" on the expiration of the thirty day period after filing, serving and posting of notice.

The facts here are undisputed; all are set out in full in Susquehanna's formal and detailed Statement filed with the I. C. C., the recitals therein being directed under the General Rules of Practice of the I. C. C., sec. 1.1(f), to "constitute evidence and be a part of the record", and none of these facts were "specifically denied in a counterpleading," nor was cross examination requested.

The theory advanced by appellants State and Board leads to an absurd result. If one thing is clear, it is that between paragraphs (1) and (2) of Section 13a, Congress intended to encompass all possible circumstances of interstate and intrastate rail transportation. In contending that Susquehanna should have proceeded under section 13a(2) they display the error of the argument advanced for that paragraph, like paragraph (1), employs the identical language "the operation or service of any train or ferry", and by their own interpretation could not embrace the operation of the shuttle bus.*

The question sought to be raised is not substantial and the effort merely represents an attempt by a single State to force indirectly the continuance of an interstate operation, an objective it cannot accomplish directly. *Erie R.R.* v. *State*, 51 N. J. Super. 61, 143 A. 2d 224 (App. 1958), grounded on *Pennsylvania R. Co.* v. *P. U. C.*, 11 N. J. 43, 93

* Appellants State and Board have refused to authorize a request made by Susquehanna a year ago, for entry of a consent order allowing it to participate in hearings before appellant Board without thereby prejudicing its claim of right to discontinue under the 13a(1) notices. This refusal has precluded the conduct of proceedings under 13a(2) on a provisional basis, thus exposing Susquehanna to the risk of unconscionable delay.

A. 2d 339 (1952), which in turn rests on *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565 (1877). Both Susquehanna and appellants State and Board were parties to that action.

The insubstantiality of the question is emphasized by the unsupportable examples of supposedly "intrastate" operations of other carriers which appellants argue would be affected by the decision below.

None of these operations by other carriers are in the record and the facts regarding them were never before the District Court.

But beyond that, appellants State and Board must know, and can hardly deny that:

1. proceedings involving 18 interstate trains between Philadelphia and southern New Jersey points were initiated under section 13a(1) and by I. C. C. order dated April 4, 1962, the service was ordered continued for one year. (I. C. C. Finance Docket No. 21606, not yet reported);

2. proceedings for discontinuance of 30 trains between Camden, N. J. and various southern New Jersey points were conducted under section 13a(2), the carriers having recognized them as intrastate trains (no interstate river crossing service being provided by the carriers as an integral part of the service of these trains), and by the same order the petition for discontinuance was denied (I. C. C. Finance Docket No. 21607, not yet reported);

3. there is perhaps one, and at most two trains, of the Pennsylvania whose service terminates at Newark; all other trains continue by tunnel to New York. These interstate trains are hardly rendered intrastate, merely because some passengers do not go beyond Newark or choose other means to go to New York;

4. the Erie-Lackawanna and Central of New Jersey operations, if within section 13a(1), would be covered by

that provision even by the narrow and strained construction of appellants State and Board, since the service obviously involves a "train" and a "ferry". The decision here can hardly affect the status of those trains;

5. the Pennsylvania, the Erie-Lackawanna and the Central of New Jersey together receive the great bulk of the annual subsidy of about $6 million provided by appellant State under contracts pursuant to N. J. P. L. 1960, ch. 66 (N. J. S. A. 48:12A-1 through 16), which require that no proceedings for discontinuance or curtailment may be taken or prosecuted without permission of appellant State. N. J. P. L. 1960, ch. 66, sec. 5 (N. J. S. A. 48:12A-5).*

Hence the purported concern about the effect of the decision on train operations elsewhere in New Jersey and performed by other carriers is imaginary and without substance.

Whether a given train of some other railroad is interstate or intrastate, so as to come within 13a(1) or 13a(2), is a fact question to be settled according to the circumstances of each case, and cannot be affected by the unique facts of the present case.

Lastly, it is observed that the question is insubstantial because it cannot affect the ultimate outcome. The undisputed record shows that the trains involved are but lightly patronized, that there is alternate public transportation by other means, that Susquehanna suffers an operating deficit on both passenger and freight operations such that continuance of the operation is an undue burden on interstate commerce. Forced continuance would be a deprivation of prop-

* Another agency of appellant State, the Division of Railroad Transportation, after hearings, ruled in April, 1962, that Susquehanna's present passenger service is so inadequate that it should receive no financial aid from the State this despite the fact that the reduction to the present schedule was pursuant to the order of appellant Board. The formula for financial aid includes no factors to compensate for cost, losses or need.

erty without due process of law. *Penna-Reading Seashore Lines* v. *P.U.C.*, 5 N. J. 114, 74 A. 2d 265 (1950).

Appellants State and Board still have open to them, under section 13a(1), the avenue of requesting a hearing by the I. C. C., in which they will have the opportunity to establish, if they can, that the service is required by public convenience and necessity and that its continuance will not unduly burden interstate commerce. Upon such showing, the I. C. C. is empowered to order a continuation of service for one year.

It is beyond dispute by any party that: (a) Susquehanna Terminal is within the carrier's terminal area at New York; (b) that the transport of passengers by special contract bus is an intraterminal transfer, so decided by the I. C. C. in the proceedings cited, coming within section 202(c) of the Act; (c) that nearly all the passengers are carried by Susquehanna between New Jersey points and New York; (d) that there are few passengers and these have alternate means of public transportation; and (e) that the unbroken losses from freight as well as passenger operations impose an unreasonable burden on interstate commerce and seriously jeopardize the ability of Susquehanna to perform any function at all.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: May , 1962.